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Glenda Thornton

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FLORIDA SENATORS ADDRESS SURROGATE MOTHERHOOD

GLEND A THORNTON

*"The fundamental right to have children either through procreation or adoption is so basic as to be inseparable from the rights to 'enjoy and defend life and liberty, [and] to pursue happiness . . . '"*¹

ON MARCH 31, 1987, a New Jersey trial court decided one of the most highly publicized and controversial cases in this country's history.² Although \$10,000 was in dispute, it definitely was not the object of the litigation. Rather, the focus of the case was a little girl known only by a pseudonym, "Baby M." The issue in the *Baby M* case, the legitimacy of surrogate motherhood, had an effect that reached far beyond New Jersey's borders and found its way onto the floor of the Florida State Senate during the 1987 Regular Session.³

In response to the *Baby M* case,⁴ Senate Bill 1081 was introduced in April, 1987, to address the issue of surrogate motherhood.⁵ The Senate bill recognized the need to regulate the complex arrangements whereby a woman enters into a surrogate motherhood agreement. She is then artificially inseminated with the semen of a (typically married) man, carries the child to term, and then surrenders all parental rights to the natural father whose infertile wife adopts the baby.⁶ Due to the difficulties many infertile couples face when trying to adopt a child,⁷ the surrogate parenting arrangement is an increasingly popular alternative.⁸ Although Sen-

1. *Grissom v. Dade County*, 293 So. 2d 59, 62 (Fla. 1974).

2. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), cert. granted, 107 N.J. 140, 526 A.2d 203 (N.J. 1987).

3. Fla. CS for CS for SB 1081 (1987).

4. Staff of Fla. S. Comm. on Judiciary-Civ., SB 1081 (1987) Staff Analysis (final May 26, 1987) (on file with committee) [hereinafter S. Judiciary-Civ. Analysis].

5. FLA. S. JOUR. 199 (Reg. Sess. Apr. 28, 1987).

6. See Keane, *Legal Problems of Surrogate Motherhood*, 1980 S. ILL. U.L. JOUR. 147.

7. Fewer women are putting their children up for adoption than ever before. This decrease in adoptable children is the result of an increase in the use of contraception, and the lessened stigma of raising illegitimate children resulting in an increased number of unwed mothers choosing to keep their children. See Griffin, *Womb for Rent*, STUDENT LAWYER, Apr. 1981, at 29.

8. Approximately 20,000 babies are conceived through artificial insemination each year. *Id.*

ate Bill 1081 failed in the Florida House of Representatives,⁹ it was the Florida Senate's first attempt to take a stand on an issue that will have a tremendous effect on family law, contract law, constitutional fundamental rights to procreation, and the states' interests in the health and welfare of its citizens.

I. STATE OF THE LAW

A. Florida

Prior to the introduction of Senate Bill 1081, the Florida Legislature had not specifically addressed the issue of surrogate parenting arrangements.¹⁰ The Adoption Act contained a provision dealing with the payment of compensation in adoption situations. Section 63.212(1)(d), Florida Statutes, makes it unlawful to sell, arrange for the sale of, or to receive a child in exchange for money or other valuable consideration.¹¹ This section also distinguishes adoptions by relatives or stepparents by allowing the payment of medical expenses incurred by the biological mother. Enacted in 1973,¹² section 63.212(1)(d) evidences the Florida Legislature's long-standing concern about "baby-selling." It is also a reminder that adoptions by relatives of the child are special situations and should be examined more leniently.

The Florida Legislature also voiced concerns about the evils of baby-selling in a section directed at those who are usually the most unscrupulous in such situations, the middlemen or intermediaries. Section 63.097, Florida Statutes, states that any fee in excess of \$500 paid to an adoption intermediary must be approved by the court prior to payment, unless it is for actual, documented medical, hospital, or court costs.¹³ Florida set the maximum intermediary fee in an attempt to ensure that couples and prospective mothers are not exploited by these middlemen.

Another aspect of surrogate parenting arrangements, the process of artificial insemination, is addressed only once in the Florida Statutes. Section 742.11 declares that there is an irrebuttable presumption of legitimacy in situations where a child conceived

9. FLA. LEGIS., HISTORY OF LEGISLATION, 1987 REGULAR SESSION, HISTORY OF SENATE BILLS at 260, SB 1081.

10. G. Newman & S. Newman, *Surrogate Parenting Part I*, 2 FLA. FAM. L. REP. 123, 126 (June 1987).

11. FLA. STAT. § 63.212(d) (1985).

12. Ch. 73-159, § 21, 1973 Fla. Laws 312, 321.

13. FLA. STAT. § 63.097 (1985). *But cf.* Fla. CS for SB 1062 at § 8 which increased the fee limit to \$1,000.

through artificial insemination is born within wedlock and the husband of the biological mother consents in writing to the insemination.¹⁴ In the state's eyes, the husband is the child's natural father.¹⁵ Obviously, this law is in direct conflict with one of the surrogate arrangements' most positive attributes: recognition of the biological father lessens the apprehension many opponents have about the agreements because the child is not placed in the custody of a stranger, but rather is cared for by its "real" father.¹⁶

These statutory provisions were the only ones even indirectly relevant to surrogate parenting arrangements in the spring of 1987 when Senate Bill 1081 was introduced. There were no attorney general opinions or administrative decisions dealing with this novel form of parenting. Furthermore, no Florida court decisions even mention the words "surrogate parenting arrangements."

However, in *Grissom v. Dade County*,¹⁷ the Florida Supreme Court reviewed an action brought by an indigent widow attempting to adopt a child whose mother had abandoned her. The plaintiff sought to either have Dade County pay the costs of publication or to have the law requiring her to incur the costs of notifying the absent mother by publication declared unconstitutional in its application. She alleged that she was precluded from court solely on the basis of her wealth because she was unable to pay the publication costs. The court held for the plaintiff finding the law unconstitutional as applied and noted that there exists a fundamental right to have children which is so basic that it cannot be distinguished from other constitutional rights recognized in this country.¹⁸ Thus, in *Grissom*, Florida's highest court acknowledged that procreation is a fundamental right and set the stage for a future surrogate party to challenge the limits of this right.

B. Other Jurisdictions

1. New Jersey

New Jersey was the site of the most famous surrogate parenting case to date. In *In re Baby M*,¹⁹ the natural father and his wife

14. FLA. STAT. § 742.11 (1985).

15. *Id.*

16. See Coleman, *Surrogate Motherhood: Analysis of The Problems and Suggestions For Solutions*, 50 TENN. L. REV. 71, 91 (1982); see also Keane, *supra* note 6, at 152.

17. 293 So. 2d 59 (Fla. 1974).

18. *Id.* at 62.

19. 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *cert. granted*, 107 N.J. 140, 526 A.2d 203 (N.J. 1987).

sued to enforce a surrogate parenting contract to compel the surrogate mother to surrender custody of the infant after she kidnapped the child and fled to Florida. The trial court reached the following conclusions: 1) the contract provision prohibiting abortion unless the natural father consented was unenforceable; 2) the contract was not one of adhesion, unconscionable or voidable in the absence of fraud; 3) the surrogate mother breached the contract by failing to surrender the child; 4) the best interests of the child were the court's main concern; 5) the laws of adoption were inapplicable; and 6) the \$10,000 consideration was not unconscionable. Since the Florida legislation at issue deals primarily with adoption law and compensation to surrogates, the court's two final findings are the most pertinent.

First, Judge Sorkow reasoned that adoption laws were inapplicable because they were created when surrogate parenting arrangements were unheard of and not a "viable procreation alternative."²⁰ Second, the court reasoned that it would be a violation of equal protection if surrogate mothers were not allowed compensation for their services.²¹ In reaching this decision, the court relied on a comparison between a surrogate mother and a surrogate father, a sperm donor. According to Judge Sorkow, "[i]f a man may offer the means for procreation then a woman must equally be allowed to do so."²² The Supreme Court of New Jersey has granted certiorari in the *Baby M* case. It will be interesting to see whether the supreme court upholds the trial court's ruling and, if so, on what grounds.

Despite the notoriety of *Baby M*, it was not New Jersey's first opportunity to tackle the issue of payments to surrogates in excess of expenses. In *In re Adoption of a Child by I.T. and K.T.*,²³ prospective adoptive parents filed a complaint for adoption. The trial judge acted, *sua sponte*, to deny relief, reasoning that a violation of the adoption laws prohibiting "trafficking in babies" rendered the adoption illegal.²⁴ However, the appellate court concluded that although the payments violated the adoption statutes, the adoption should be upheld because it was the court's overriding duty to apply the best interests of the child standard, and the best inter-

20. *Id.* at 372, 525 A.2d at 1157.

21. *Id.* at 388, 525 A.2d at 1165.

22. *Id.* This argument is by far one of the most persuasive in favor of compensation for surrogates.

23. 164 N.J. Super. 476, 397 A.2d 341 (N.J. Super. Ct. App. Div. 1978).

24. *Id.* at 480, 397 A.2d at 342-43.

ests of the child were to remain in the custody of the prospective adoptive parents.²⁵ Based on this case law, New Jersey's present position regarding surrogate parenting is that the only applicable standard is what is in the child's best interest.

2. Arkansas

Currently, Arkansas is the only state that has passed legislation dealing specifically with the issue of surrogate parenting.²⁶ According to the Arkansas statute, if a child conceived through artificial insemination is born to a married woman, her husband is presumed to be the natural father if he consents to the insemination.²⁷ Additionally, the statute states that the woman giving birth is the presumed mother even if she is unmarried.²⁸ However, there is one very relevant exception to these statutory provisions. If the unmarried woman who conceives through artificial insemination is a surrogate, then the woman who is expected to adopt the child will be considered its legal mother. Initially, the surrogate's name will appear on the birth certificate. However, a substituted certificate can be issued by court order which will bear the adoptive mother's name.

Arkansas' approach to regulating surrogate parenthood is novel, and the procedure has not been challenged in court. Therefore, the legal effect this approach will have on surrogate parenting in Arkansas is still unknown. It is interesting to note, however, that Arkansas distinguishes between unmarried and married mothers by recognizing surrogate parenthood when the surrogate is unmarried, but creating additional obstacles when she is married.

3. Michigan

The state of Michigan first encountered a controversy involving payment to surrogate mothers in *Doe v. Kelley*.²⁹ *Doe* involved a suit by a married couple who contracted with a surrogate to bear the husband's child. The couple brought suit against the state Attorney General, Frank J. Kelley, in an effort to have the statutes³⁰ prohibiting payment in adoption proceedings declared unconstitu-

25. *Id.* at 484, 397 A.2d at 344.

26. Newman & Newman, *supra* note 10, at 127.

27. ARK. STAT. ANN. § 34-720 (Supp. 1985).

28. *Id.* at § 34-721(B).

29. 106 Mich. App. 169, 307 N.W.2d 438 (Mich. Ct. App. 1981).

30. MICH. COMP. LAWS ANN. §§ 710.54, 710.69 (West 1987).

tional.³¹ The Michigan Court of Appeals held that the statutes did not interfere with the plaintiffs' right to privacy and their right to make contractual arrangements to adopt a child.³² The statutes merely prohibited the plaintiffs from paying consideration while using the state's adoption procedures.³³ Although the decision never expressly banned surrogate parenting, it had the equivalent effect. Even though some women become surrogates without the added incentive of payment, some commentators believe that most potential surrogate mothers will not risk the dangers of pregnancy without additional compensation.³⁴

A more recent Michigan decision, *Syrkowski v. Appleyard*,³⁵ gave the state supreme court an opportunity to issue a ruling on the surrogate issue. In that case, a married woman was artificially inseminated with the plaintiff's semen, pursuant to a surrogate parenting agreement. The surrogate mother was paid \$10,000 in addition to her medical expenses. A Michigan statute³⁶ similar to section 742.11, Florida Statutes,³⁷ named the surrogate's husband as the legal father if he consented to the insemination. The trial court held that the court did not have jurisdiction to decide the issue. The Michigan Supreme Court reversed the decision, holding that the court did have jurisdiction to hear the biological father's request where he and the biological mother entered into a surrogate parenting agreement.³⁸ The supreme court in *Syrkowski* declined to address the issue of compensation. Thus, the *Doe* holding still stands as a prohibition against payment for a surrogate mother's promise to bear a child by means of artificial insemination.

4. Kentucky

The Kentucky Supreme Court recently had occasion to consider the issue of surrogate parenting in *Surrogate Parenting Associates Inc. v. Commonwealth of Kentucky*.³⁹ The Kentucky Attorney General, David Armstrong, did not limit his opposition to surro-

31. *Doe*, 106 Mich. App. at 170, 307 N.W.2d at 439.

32. *Id.* at 173-74, 307 N.W.2d at 441.

33. *Id.* at 174, 307 N.W.2d at 441.

34. See Comment, *Womb for Rent: A Call for Pennsylvania Legislation Legalizing and Regulating Surrogate Parenting Agreements*, 90 DICK. L. REV. 227, 235 (1985).

35. 420 Mich. 367, 362 N.W.2d 211 (Mich. 1985).

36. MICH. COMP. LAWS § 333.2824(6) (1980).

37. FLA. STAT. § 742.11 (1985).

38. *Syrkowski*, 420 Mich. at 367, 362 N.W.2d at 211.

39. 704 S.W.2d 209 (Ky. 1986).

gate parenting arrangements to his official opinions.⁴⁰ Instead, he initiated suit to revoke the license of a corporation that arranged surrogate parenting.⁴¹ The Attorney General asserted that the corporation misused its corporate powers and harmed the welfare of the state. However, the Kentucky Supreme Court rejected this argument and held that the corporation's involvement in surrogate parenting did not contravene the statute prohibiting purchasing a child for purposes of adoption.

First, the court reasoned that the evils of baby-selling are not present in surrogate arrangements because the agreement is entered into before conception.⁴² This, according to the court, is significant because the surrogate mother's concerns are not the problems presented by unwanted pregnancy or the added financial burden of raising a child. Instead, she has the opportunity to seriously consider her options long before she is impregnated.

Second, the court considered surrogate motherhood similar to in vitro fertilization,⁴³ which the statute expressly stated was not prohibited.⁴⁴ Both procedures assist childless couples in conception. Since the legislature expressly mentioned one and not the other, the court concluded that prohibition of surrogate parenting could not be implied.⁴⁵

Third, the court stated that the adoption statute prohibiting compensation was inapplicable.⁴⁶ The reasoning on this issue was similar to that of Judge Sorkow in the *Baby M* case.⁴⁷ Essentially, the court stated that since any custody struggle would be between the child's biological parents, and a father can neither buy nor adopt his own child, the only applicable standard is what is in the child's best interest.⁴⁸ After holding that the corporation's actions did not contravene the statutory prohibition against baby-selling, the court spoke of the judiciary's proper role in deciding such controversial issues. Specifically, the court stated that it is the legislature's responsibility to outline a solution, and the courts should

40. Op. Ky. Att'y Gen. No. 81-18 (Jan. 26, 1981).

41. *Surrogate Parenting Assoc.*, 704 S.W. 2d at 210.

42. *Id.* at 211.

43. *Id.* at 212.

44. KY. REV. STAT. ANN. § 199.590(2) (Baldwin Supp. 1986).

45. *Surrogate Parenting Assoc.*, 704 S.W.2d at 212.

46. *Id.*

47. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), cert. granted, 107 N.J. 140, 526 A. 2d 203 (N.J. 1987).

48. *Surrogate Parenting Assoc.*, 704 S.W.2d at 212.

only participate "when a proposed solution violates individual constitutional rights. . . ." ⁴⁹

5. Other States' Actions

At present, at least twenty-four states have statutes prohibiting payments in adoption situations either completely or with some limited exceptions. Some of the exceptions in these statutes allow payments for legal fees, medical and hospital costs, and court approved fees.⁵⁰ On the other hand, some states have considered allowing monetary compensation if it is reasonable.⁵¹ The advocates of these proposals maintain that such statutes do not amount to baby-selling, because the payments are only for the surrogate's services, not consideration for relinquishment of her parental rights.⁵² Some state legislators have also proposed setting maximum limits for this "reasonable" compensation.⁵³ Overall, the country is beginning to recognize surrogate parenting as a viable alternative to remaining childless. States that have taken some action are attempting to meet the needs of a growing segment of their population, not by closing their eyes to a scientific advancement that is controver-

49. *Id.* at 213.

50. **Alabama:** ALA. CODE § 26-10-8 (1986); **Arizona:** ARIZ. REV. STAT. ANN. § 8-126 (1974); **California:** CAL. PENAL CODE § 273 (West 1987); **Colorado:** COLO. REV. STAT. § 19-4-115 (1986); **Delaware:** DEL. CODE ANN. tit. 13, § 928 (1981); **Florida:** FLA. STAT. § 63.212 (1985); **Georgia:** GA. CODE ANN. § 19-8-19 (1982); **Idaho:** IDAHO CODE § 18-1511, 1512 (1979); **Illinois:** ILL. ANN. STAT. ch. 40, para. 1526, 1701-1703 (Smith-Hurd 1980); **Indiana:** IND. CODE ANN. § 35-46-1-9 (Burns Supp. 1985); **Iowa:** IOWA CODE ANN. § 600.9(2) (West 1981); **Kentucky:** KY. REV. STAT. ANN. § 199.590(2) (Baldwin 1982); **Maryland:** MD. FAM. LAW CODE ANN. § 5-327 (1984); **Massachusetts:** MASS. GEN. LAWS ANN. ch. 210, § 11A (West Supp. 1987); **Michigan:** MICH. COMP. LAWS ANN. § 710.54 (West Supp. 1987); **Nevada:** NEV. REV. STAT. § 127.290 (1985); **New Jersey:** N.J. STAT. ANN. § 9:3-54 (West Supp. 1987); **New York:** N.Y. SOC. SERV. LAW § 374(6) (McKinney 1983); **North Carolina:** N.C. GEN. STAT. § 48-37 (1984); **Ohio:** OHIO REV. CODE ANN. § 3107.10 (Anderson 1982); **South Dakota:** S.D. CODIFIED LAWS ANN. § 25-6-4.2 (1984); **Tennessee:** TENN. CODE ANN. § 36-1-135 (1984); **Utah:** UTAH CODE ANN. § 76-7-203 (1978); **Wisconsin:** WIS. STAT. ANN. § 946.716 (West 1982).

51. See Comment, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1, 51 (1986) (citing Cal. Assembly 1707, 1985-86 Reg. Sess. § 2 (1985)).

52. See Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REF. 865, 893 (1985); Note, *Surrogate Motherhood: Contractual Issues and Remedies under Legislative Proposals*, 23 WASHBURN L.J. 601, 625 (1984); Note, *Surrogate Parenthood—An Analysis Of The Problems And A Solution: Representation For The Child*, 12 WM. MITCHELL L. REV. 143, 156 (1985). *Contra* Comment, *supra* note 51, at 24.

53. See Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1662 n.122 (1984) (discussing a 1981 Michigan bill that proposed a maximum fee for surrogates).

sial, but by attempting to define its legal status. Although a commendable endeavor, many mistakes can and have been made. A legitimate question at this point is: Was Senate Bill 1081 a genuine attempt to meet the needs of surrogate parenting or a mistake?

II. THE 1987 FLORIDA LEGISLATIVE SESSION

A. *Summary And Legislative History of Senate Bill 1081*

Originally, Senate Bill 1081 [hereinafter "the bill"], which was introduced by Senator Ros-Lehtinen⁵⁴ on April 28, 1987, and referred to the Senate Health and Rehabilitative Services Committee,⁵⁵ contained only two brief amendments to the Florida Adoption Act.⁵⁶ Because surrogate parenting arrangements usually involve the adoption of the child in question by the biological father's wife, the bill's sponsors believed that the adoption statute was the most appropriate means to regulate surrogate arrangements. Specifically, the bill amends section 63.212, Florida Statutes, which is entitled "Prohibited acts; penalties for violation." First, the bill extended the statutory definition of "child" to all children "whether born, conceived but yet unborn, or identified in any way but not yet conceived."⁵⁷ Further, Senate Bill 1081 also added a section to the statute which would outlaw any contract for the purchase, sale, or transfer of custody or parental rights, in connection with any child, in return for valuable consideration. Thus, any contract for the sale of parental rights would remain void and unenforceable as well as contrary to the state's public policy.

The Senate Health and Rehabilitative Services Committee's Committee Substitute for Senate Bill 1081 deleted the definition of "mother" in section 63.032, Florida Statutes.⁵⁸ "Mother" was to be defined as "a woman who has borne and given birth to a child, regardless of the manner of conception."⁵⁹ This would bring surrogate mothers within the statute's scope and require that any relinquishment of parental rights be in accordance with chapter 63, Florida Statutes.

On May 21, 1987, the Senate Judiciary-Civil Committee's second Committee Substitute for Senate Bill 1081 made a significant addi-

54. Repub., Miami.

55. FLA. S. JOUR. 199 (Reg. Sess. Apr. 28, 1987).

56. FLA. STAT. ch. 63 (1985).

57. Fla. SB 1081 (1987).

58. Fla. CS for SB 1081 (1987).

59. *Id.* § 1.

tion to the legislation. The Committee's amendment to section 63.212, Florida Statutes, included an explanatory statement that exempted payments for the mother's medical and psychological expenses from the prohibition, as long as such payments were not contingent upon the relinquishment of parental rights.⁶⁰ Therefore, surrogate parenting arrangements which involved compensation beyond pregnancy-related expenses would be punishable by up to five years imprisonment.⁶¹ With these proposed changes, the bill went to the Senate floor on June 4, 1987.⁶²

One of the primary concerns expressed in the committee hearings was the bill's apparent conflict with a current statute imposing fewer restrictions on family members "within the third degree" or stepparents wishing to adopt a relative.⁶³ Since in the surrogate situation, the prospective adoptive couple is usually the child's natural father and stepmother, legislation prohibiting what could be considered a "family" adoption seemed to conflict with the current law's leniency.

Supporters stressed that the surrogate mother is the child's true mother, and argued that to allow financial gain would be degrading to women.⁶⁴ Therefore, this legislation emphasized protecting the mother by redefining that term to include surrogates.⁶⁵ This clash of laws is actually a clash of interests—the interests of the adopting couple versus those of the natural mother. Unfortunately, the truly innocent party, the child, is caught in the middle.

Another question raised was what constituted "pregnancy-related expenses."⁶⁶ The term was not adequately defined in the legislation. Since a concise definition was lacking, some would argue that these expenses include compensation for living expenses during pregnancy. Due to the ambiguity of the term "living expenses," some senators argued that the bill did not properly address the issue of compensation.⁶⁷

60. Fla. CS for CS for SB 1081, § 2 (1987).

61. FLA. STAT. ch. 775 (1985). A person found guilty of a felony in the third degree, may be punished "by a term of imprisonment not exceeding 5 years." *Id.* at § 775.082(3)(d).

62. FLA. LEGIS., HISTORY OF LEGISLATION, 1987 REGULAR SESSION, HISTORY OF SENATE BILLS at 260, SB 1081.

63. FLA. STAT. § 63.212(1)(a) (1985).

64. Fla. S. Comm. on HRS, tape recording of proceedings (May 22, 1987) (on file with committee) (statement of Senator Ileana Ros-Lehtinen, sponsor of bill) [hereinafter S. HRS Tape].

65. Fla. CS for SB 1081, § 1(5) (1987).

66. *Id.* at § 2(1)(i).

67. S. HRS Tape, *supra* note 64.

However, despite the controversial nature of surrogate parenthood, the issue of compensation to surrogates did not produce a heated debate. Perhaps this is a sign of the relative ambivalence among Floridians on this issue. Regardless of the general apathy, the need for some type of surrogate parenthood legislation has been recognized by the Florida Senate.

B. Other Legislation

Several other bills filed during the 1987 Legislative Session directly addressed surrogate parenting, but did not reach the Senate floor. The two bills most squarely on point were both introduced in the Florida Senate on April 30, 1987,⁶⁸ and subsequently ended their respective journeys through committees on June 6, 1987.⁶⁹ Senate Bill 1288,⁷⁰ introduced by Senator Richard H. Langley,⁷¹ called for the creation of the Surrogate Parent Act which included the following provisions: 1) require that both parties be represented by counsel; 2) require that a special petition be presented to a court for its approval before drafting agreements; 3) prescribe provisions to be outlined in surrogate parenting contracts; 4) provide the presumption that the biological father is also the legal father; 5) allow "reasonable monetary compensation" to be paid to surrogate mothers by way of an escrow account or attorney trust account; 6) provide that the foregoing payments constitute compensation for her "services"; 7) allow certain relief in case of breach, including specific performance, if appropriate; and 8) provide that the act control over any conflicting laws.⁷² In essence, this bill would have legitimized surrogate parenting arrangements provided certain conditions were met.

On the other hand, Senate Bill 1297,⁷³ sponsored by Senator Pat Frank,⁷⁴ was much less accommodating to such agreements. Senate Bill 1297 created the Surrogate Parenthood Act which succinctly embodied a prohibition against surrogate parenting arrangements and imposed criminal sanctions unless specific guidelines were

68. FLA. S. JOUR. 237 (Reg. Sess. Apr. 30, 1987) (Senate Bill 1288 introduced); *id.* at 238 (Senate Bill 1297 introduced).

69. FLA. LEGIS., HISTORY OF LEGISLATION, 1987 REGULAR SESSION, HISTORY OF SENATE BILLS at 301, SB 1288; *id.* at 303, SB 1297.

70. Fla. SB 1288 (1987).

71. Repub., Clermont.

72. Fla. SB 1288 (1987).

73. Fla. SB 1297 (1987).

74. Dem., Tampa.

strictly adhered to. These guidelines included the following: 1) agreements must be in writing; 2) agreements must include provisions establishing parental rights and child support responsibility; 3) compensation to any party is prohibited, unless to pay for pregnancy-related treatment; 4) intestate inheritance is prohibited unless it is from the parent or parents having the parental rights to the child; and 5) violators of the act will be guilty of a felony in the third degree.⁷⁵ The act also contained a provision declaring it a third degree felony to implant a human egg into anything other than a female of the *Homo Sapiens* species.⁷⁶

The purpose of Senate Bill 1297 was to prohibit "the commercialization of surrogate parenthood and to define the appropriate limits within which persons may make surrogate parenthood arrangements."⁷⁷ Senate Bill 1288, however, would have established more permissive limitations on this new scientific practice. Despite their contrasting approaches, both of these bills had one factor in common which may have led to their early demise; both bills created new acts dedicated solely to surrogate parenthood.⁷⁸ Perhaps the inability of these two pieces of legislation to make it beyond their respective committees indicates that the Florida Legislature is unwilling to squarely confront this issue.

Other legislation, however, will have a significant affect on surrogate parenthood. Committee Substitute for Senate Bill 1062, which unanimously passed both houses of Florida's Legislature, amends the existing Adoption Act, chapter 63, Florida Statutes.⁷⁹ Two aspects of the bill are especially important. First, it provides that in all adoption proceedings, the courts should enter orders necessary to "protect the best interests of the person to be adopted."⁸⁰ Second, the bill increases the \$500 limit on intermediary's fees to \$1,000 unless a larger fee can be justified.⁸¹

III. ANALYSIS

The primary function of Senate Bill 1081 was to prohibit the compensation of the surrogate mother, which is perhaps the most

75. Fla. SB 1297 (1987).

76. *Id.* at 4.

77. *Id.* at 1-2.

78. Senate Bill 1288 proposed creating the "Surrogate Parent Act." Senate Bill 1297 proposed creating the "Surrogate Parenthood Act."

79. Fla. CS for SB 1062 (1987) (proposed amendments to FLA. STAT. ch. 63).

80. Fla. CS for SB 1062, § 1 (1987).

81. *Id.* § 8.

controversial aspect of the surrogate parenting arrangement.⁸² Although some may contend that payments to the mother play a small role in the surrogate procedure, it is likely that legislation forbidding such payments would have an extremely adverse effect on such arrangements.⁸³

First, even though there are some prospective surrogates who would agree to perform the service without compensation, most would probably not endure the risks of pregnancy without it.⁸⁴ Indeed, some proponents of surrogate arrangements do not believe surrogates should risk pregnancy dangers without compensation.⁸⁵ These advocates contend that the payments serve two valuable purposes. The most powerful justification is that the additional fee represents compensation for the services provided by the surrogate mother.⁸⁶ Thus, the payments cover the risks of pregnancy and giving birth and indemnify the surrogate for any loss of income she sustains during the pregnancy period.⁸⁷

Despite this, at least twenty-four states have enacted statutes which prohibit compensation beyond expenses.⁸⁸ In addition to prohibiting payment to surrogates for the parental rights to the child, these statutes attempt to meet the need for effective regulation of surrogate arrangements. In order to thoroughly assess the statutes' effectiveness, the positive and negative aspects of surrogate parenting must first be examined.

The most beneficial feature of a surrogate arrangement is that it represents a viable alternative for infertile couples who wish to have children.⁸⁹ The most attractive aspect of surrogate parenting to infertile couples is that instead of waiting years for a child through the normal adoption procedure,⁹⁰ they can have a baby in a matter of months. The adopting father is also the biological father.⁹¹ Thus, the child is not adopted by strangers but is placed with the custody of its natural father and stepmother. Since some

82. S. Judiciary-Civ. Analysis, *supra* note 4.

83. See Comment, *supra* note 34, at 235-36.

84. *Id.* at 231.

85. See *supra* note 52 and accompanying text for a list of articles contending that these excess payments are for services rendered and therefore legitimate.

86. *Id.*

87. *Id.*

88. See *supra* note 50.

89. See *supra* note 7-8 and accompanying text.

90. The average waiting period for couples attempting to adopt a child is from three to seven years. *Adoption and Foster Care 1975: Hearings on Baby-Selling Before the Subcomm. on Labor and Public Welfare, 94th Cong., 1st Sess. 4 (1975).*

91. See *supra* text accompanying note 7.

states, including Florida, have enacted statutes that are less restrictive when children are adopted by relatives,⁹² perhaps laws aimed at regulating surrogate parenting should be more permissive as well.⁹³ The unique opportunity surrogate parenting provides is the reason so many couples are willing to go through the complicated surrogate procedure.

Other positive characteristics of surrogate parenting distinguish it from the evils commonly associated with baby-selling. First, the surrogate agreement is prepared and signed before conception.⁹⁴ As a result, the surrogate is able to rationally consider the arrangement without being distracted by an unwanted pregnancy and the financial and emotional problems that accompany it. On the contrary, the child is not only wanted, but actively sought by the contracting couple.

Surrogate parenting arrangements also provide access to family health history that is usually not available in normal adoptions.⁹⁵ The close relationship many surrogates establish with the couple utilizing their services allows questions to arise about the surrogate's health and whether her family has a history of certain diseases.⁹⁶ Thus, information is shared that may be very crucial to the health and well-being of the child.

A compelling comparison can also be made between the surrogate mother and her male counterpart, the sperm donor.⁹⁷ The service sperm donors provide is analogous to that of surrogate mothers: a means through which infertile couples can become parents. The only difference between the two services is that instead of fulfilling the functions of the infertile wife, sperm donors fulfill the functions of the infertile husband.⁹⁸ No principled distinction exists between these two surrogates. Yet, it is a common and acceptable practice to pay sperm donors.

Therefore, proponents of surrogate arrangements contend that to allow and condone the compensation of sperm donors and to

92. See FLA. STAT. § 63.212 (1985).

93. See Coleman, *supra* note 16, at 113.

94. See Keane, *supra* note 6 and accompanying text for the definition of a "surrogate mother." Contracting before conception is a factor common to most surrogate arrangements. *Id.*

95. See Comment, *supra* note 51, at 23.

96. *Id.*

97. A sperm donor anonymously donates his semen to be artificially inseminated with the egg of a sterile husband's fertile wife.

98. See *In re Baby M*, 217 N.J. Super. 313, 388, 525 A.2d 1128, 1165 (N.J. Super. Ct. Ch. Div. 1987), *cert. granted*, 107 N.J. 140, 526 A.2d 203 (N.J. 1987).

deny compensation to surrogate mothers is a violation of equal protection.⁹⁹ Indeed, it could be argued that because surrogate mothers must endure the risks and dangers of pregnancy, and sperm donors carry out their service with virtually no risk at all, the surrogate mothers should not only be compensated, but should be paid more than the surrogate fathers.¹⁰⁰ Indeed, the risk of emotional attachment is far greater for surrogate mothers, who for nine months, carry a child they know they must surrender at birth.¹⁰¹ One commentator, Katie Marie Brophy, who is also the cofounder of Surrogate Family Services, Inc. in Kentucky, accurately summarizes the views of many surrogate compensation supporters:

Men can sell sperm. A man who is an anonymous donor receives \$25 for every sperm sample—which involves no pain or stress on his body or on his social life. A surrogate is pregnant twenty-four hours a day for nine months. She deserves to be paid for her time and energy—not to mention the physical suffering she endures and the risk to her health she undertakes for the adoptive parents' benefit¹⁰²

Lastly, many contend that surrogate parenting arrangements are protected under the due process clause of the fourteenth amendment, which has been interpreted to guarantee the right of privacy.¹⁰³ Through various opinions, the United States Supreme Court has extended this right to include the right to marriage, procreation, contraception, abortion, family life, and the raising of children.¹⁰⁴ The Court has also declared that governmental intrusion into these areas is prohibited. The only exception is when the state can show a compelling interest and a remedy narrowly drawn to meet that interest.¹⁰⁵ These constitutional rights could be used to challenge legislation prohibiting surrogate parenting arrangements.¹⁰⁶ Indeed, if procreation is protected by the Constitution, then arguably all forms of procreation are protected. However, problems arise when certain aspects of a protected right are de-

99. *See id.*

100. *See Griffin, supra* note 7, at 31.

101. *See Hollinger, supra* note 52, at 894.

102. *Id.*

103. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

104. *See generally Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

105. *Griswold v. Connecticut*, 481 U.S. 479 (1965).

106. *S. Judiciary-Civ. Analysis, supra* note 4, at 3.

clared unlawful. For example, legislation like Senate Bill 1081 prohibits compensation to surrogates. Many surrogate parenting advocates argue that surrogate parenting as a whole is a protected right, and prohibiting certain portions of it does not lessen that protection.¹⁰⁷ Consequently, prohibiting compensation necessarily unconstitutionally prohibits the entire practice. As one commentator succinctly put it, "What the state cannot overtly prohibit, it cannot indirectly outlaw either."¹⁰⁸

But there are also many arguments against surrogate arrangements. A major concern is the question of the child's legitimacy. Presently, twenty-eight states including Florida¹⁰⁹ have statutes which proclaim that if the surrogate is married and her husband consents to the insemination, it will be presumed that he (not the biological father) is the legal father of the child.¹¹⁰ These statutes thwart the intent of surrogate parenting arrangements.¹¹¹ However, many courts refuse to rebut this presumption of legitimacy for to do so would mean labeling the child a bastard.¹¹² Clearly, such laws may weaken the biological father's standing to assert his paternity rights.¹¹³

107. See Keane, *supra* note 6, at 162-163.

108. *Id.*

109. See **Alabama**: ALA. CODE § 26-17-21 (1986); **Alaska**: ALASKA STAT. § 25.20.045 (1983); **Arkansas**: ARK. STAT. ANN. § 61-141(c) (1971); **California**: CAL. CIV. CODE § 7005 (West 1983); **Colorado**: COLO. REV. STAT. § 19-6-106 (1986); **Connecticut**: CONN. GEN. STAT. ANN. §§ 45-69f & 45-69n (West 1981); **Florida**: FLA. STAT. ANN. § 742.11 (West Supp. 1984); **Georgia**: GA. CODE ANN. § 19-7-21 (1982); **Idaho**: IDAHO CODE § 39-5405-01 (1984); **Illinois**: ILL. ANN. STAT. ch. 40, para. 1453 (Smith-Hurd Supp. 1987); **Kansas**: KAN. STAT. ANN. § 23-129 (1981); **Louisiana**: LA. CIV. CODE ANN. art. 188 (West Supp. 1987); **Maryland**: MD. EST. & TRUSTS CODE ANN. § 1-206(b) (1974); **Michigan**: MICH. COMP. LAWS ANN. § 333.2824 (West 1980); **Minnesota**: MINN. STAT. ANN. § 257.56 (West 1982); **Montana**: MONT. CODE ANN. § 40-6-106 (1983); **Nevada**: NEV. REV. STAT. § 126.061 (1985); **New Jersey**: N.J. STAT. ANN. § 9:17-44 (West 1987); **New York**: N.Y. DOM. REL. LAW § 73 (McKinney 1986); **North Carolina**: N.C. GEN. STAT. § 49A-1 (1984); **Oklahoma**: OKLA. STAT. ANN. tit. 10, § 552 (West 1987); **Oregon**: OR. REV. STAT. §§ 109.239 & 109.243 (1983); **Tennessee**: TENN. CODE ANN. § 68-3-306 (1983); **Texas**: TEX. FAM. CODE ANN. § 12.03 (Vernon 1974); **Virginia**: VA. CODE ANN. § 64.1-67.1 (1987); **Washington**: WASH. REV. CODE ANN. § 26.26.050 (West 1986); **Wisconsin**: WIS. STAT. ANN. § 891.40 (West Supp. 1986); **Wyoming**: WYO. STAT. § 14-2-103 (1977).

110. FLA. STAT. § 742.11 (1985) provides: "Any child born within wedlock who has been conceived by the means of artificial insemination is irrebuttably presumed to be legitimate, provided that both husband and wife have consented in writing to the artificial insemination."

111. Theoretically, surrogate parenting arrangements provide an infertile couple the opportunity to care for the husband's natural child. Recognizing biological paternity helps legitimize the surrogate procedure.

112. See Coleman, *supra* note 16, at 91.

113. *Id.* at 91-92.

Opponents of surrogate parenting have also focused on negative perceptions of such arrangements. The most common is that surrogate motherhood is really "baby-selling." Some also contend that when the mother relinquishes all custody rights to the child, she is actually abandoning it.¹¹⁴ Further, because the father is married to someone other than the surrogate, some would argue that the parties involved are committing adultery.¹¹⁵ Lastly, some maintain that the arrangement is merely a sophisticated form of prostitution and is therefore inherently illegal.¹¹⁶

Adultery involves sexual intercourse between two people who are not married to each other.¹¹⁷ In the usual surrogate parenting situation, the conception is achieved through the process of artificial insemination, not sexual intercourse. Another hurdle this adultery notion finds difficult to leap is that in surrogate arrangements, the wife who will adopt the child consents to the process.¹¹⁸ Also, if the surrogate is married, her husband usually consents to the process as well. Consequently, all parties involved demonstrate their concurrence with the endeavor. Thus, the adultery argument is clearly inappropriate.

The claim that commercial surrogate parenting is actually a form of prostitution also ignores the basic features of the procedure. Prostitution entails payment for sexual favors.¹¹⁹ As stated above, surrogate parenting usually does not involve any sexual activity between the parents. Therefore, like the adultery claim, the prostitution contention has received little support.

Perhaps the most disturbing argument against surrogate parenting is the assertion that these arrangements exploit the lower classes for the benefit of the wealthy. This claim centers around what is at the heart of Senate Bill 1081: the realization that only the rich can afford the substantial payments to surrogates.¹²⁰ This is true regardless of whether the payments are for surrendering parental rights, reasonable compensation for services, or any other description those involved may wish to attach. Opponents claim

114. See Lorio, *supra* note 53, at 1656-57.

115. *Id.* at 1657.

116. *Id.*

117. See Keane, *supra* note 6, at 151.

118. *Id.* at 151-52.

119. WEBSTER'S NEW COLLEGIATE DICTIONARY 926 (1973) defines "prostitution" as the act or practice of "indulging in promiscuous sexual relations especially for money."

120. The normal fee is usually between \$5,000 and \$10,000. However, some couples pay as much as \$20,000. Granelli, *Surrogate Mother Sued Over Custody Agreement*, 3 NAT'L L.J., Apr. 6, 1981, at 4, col. 2 (quoting Katie Brophy).

that combating the unfairness stemming from surrogate arrangements is one of the primary purposes of anti-baby-selling legislation similar to Senate Bill 1081.¹²¹ Accordingly, one goal of such legislation is to ensure that adoption is available to all childless couples regardless of financial status.

Surrogate parenting is obviously a very complex issue. It raises the sensitive topic of the custody of a child. Legislation regulating this practice is therefore vital. Florida Senate Bill 1081¹²² addressed the problem of the commercialization of the practice; but did the bill adequately address all the intricate issues of surrogate parenting?

Neither advocates nor opponents of surrogate parenting dispute that legislation is needed to establish procedures to regulate surrogate arrangements.¹²³ In examining Senate Bill 1081, few would say that it meets this need. Obviously, the other two Senate bills introduced this session, Senate Bills 1288 and 1297, provide a more extensive outline for the regulation of each aspect of surrogate parenting. Senate Bill 1081, however, addressed only one of the many issues in surrogate arrangements, the payments for relinquishing parental rights.

Senate Bill 1081 was never meant to address *all* the issues of surrogate parenting. The bill's original sponsor, Senator Ileana Ros-Lehtinen, put it best when she said, "Financial gain is relevant in these contracts and that's why my bill specifically relates to the commercial aspect of these contracts."¹²⁴ Although there may be some question about the definition of "expenses for pregnancy-related medical or psychological care or treatment,"¹²⁵ the bill did meet its goal of prohibiting financial gain from the transfer of parental rights.¹²⁶ In light of the fact that the bill was the first to pass Florida Senate directly addressing surrogate parenting and will undoubtedly be referred to in drafting future legislation, its sponsor and drafters should be applauded for recognizing the significance of this issue and making an ardent effort to address it.

121. See S. HRS Tape, *supra* note 64.

122. Fla. CS for CS for SB 1081 (1987).

123. See Comment, *Surrogate Motherhood: Contractual Issues and Remedies under Legislative Proposals*, 23 WASHBURN L.J. 601, 637 (1984); *Artificial Insemination and Surrogate Motherhood—A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L. REV. 913, 950 (1981).

124. S. HRS Tape, *supra* note 64.

125. Fla. CS for CS for SB 1081 (1987).

126. *Id.* The bill accomplishes its purpose by imposing penalties upon those who attempt to profit from surrogate arrangements.

However, since the bill does not regulate, but rather prohibits, it is unable to overcome one obstacle that has led to the demise of similar legislation in other jurisdictions. In prohibiting compensation to surrogates, the bill also prohibits the very practice it attempts to regulate.¹²⁷ The number of prospective surrogates is likely to decrease tremendously if additional compensation is outlawed.¹²⁸ The least desirable, yet most probable consequence of such legislation would be to drive the parties underground.¹²⁹ Then, none of the parties involved, especially the child, would be protected. This situation would definitely be contrary to Florida's public policy of ensuring the best interests of its children. What is needed is a more enlightened regulatory scheme.

IV. ALTERNATIVES

Within the past five years, other jurisdictions have attempted to fill the void in surrogate regulation by proposing legislation they consider appropriate. The only state to pass legislation regulating the practice is Arkansas.¹³⁰ Ironically, Arkansas' statute does not include a provision for the suggestion receiving the most support from commentators:¹³¹ the proposal that a statutory maximum fee be set to eliminate the appearance that the parties can negotiate a fee for the child.¹³² This would also remove the danger that some surrogates will threaten to breach the contract unless the price is raised. Another proposal to lessen the danger of a breach is that intensive screening of all parties should be required to ensure their sincerity before entering into the arrangement.¹³³ This screening would involve psychological as well as medical testing of the surrogate and the natural father.¹³⁴

A major question often raised by surrogate opponents is: Should specific performance be a possible remedy in case of a breach by the surrogate?¹³⁵ Indeed, specific performance is rarely awarded in

127. By prohibiting compensation to surrogates, Senate Bill 1081 essentially outlaws the practice itself because compensation is usually a major incentive for surrogates. This shortcoming is inherent in all legislation which merely prohibits compensation without detailing further guidelines.

128. See Newman & Newman, *supra* note 10, at 127.

129. See Comment, *supra* note 34, at 235-36.

130. See Lorio, *supra* note 53, at 1665.

131. ARK. STAT. ANN. § 34.721 (Supp. 1985).

132. Hollinger, *supra* note 52, at 895.

133. Comment, *supra* note 51, at 44.

134. *Id.*

135. Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611, 620 (1978).

personal service contracts, due to the prohibition against involuntary servitude. This concern is heightened in surrogate parenting situations, because few courts would require that a woman, who has freedom of choice when it comes to her body, be impregnated, carry a child to term, and surrender it at birth, against her will.¹³⁶ However, at least one commentator believes courts should permit specific performance because to do otherwise would greatly harm the rights of the father.¹³⁷

Interestingly, a 1985 proposal made by the District of Columbia Council addressed one of the shortcomings of bills similar to Senate Bill 1081, the insufficient definition of "pregnancy-related expenses."¹³⁸ The proposal listed the following expenses: 1) medical, psychiatric and psychological tests and treatment directly related to the pregnancy before, during, and after pregnancy; 2) all legal representation fees incurred in drafting the agreement; 3) medications and special foods prescribed by a physician that are directly related to the pregnancy; 4) maternity clothing; and 5) any loss of income incurred as a direct result of the pregnancy.¹³⁹ Although this definition may not be exactly what the Florida bill's drafters contemplated, it does offer some guidelines.

Other suggestions range from requiring immediate paternity testing, to granting the child access to all surrogate information upon his eighteenth birthday.¹⁴⁰ The two other Florida surrogate bills introduced this session contain many of the commonly recommended practices.¹⁴¹

V. CONCLUSION

Surrogate parenting is no longer a gleam in a scientist's eye; it is a reality, and it deserves recognition. This process has given many childless couples something they never had before: a choice. It is also a novel concept with many legal stumbling blocks. However, many believe that a concentrated effort to surmount these problems can be successful.

136. Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 202-03 (1986).

137. See Note, *Rumpelstiltskin Revisited: The Inalienable Rights of Surrogate Mothers*, 99 HARV. L. REV. 1936, 1955 (1986).

138. Comment, *supra* note 51, at 51 (citing D.C. Council 6-152 § 5 (1985)).

139. *Id.* at 51 n.257.

140. See *id.* at 50.

141. Fla. SB 1288 (1987); Fla. SB 1297 (1987).

The Florida Senate has recognized the need for action. Although Florida courts have yet to be confronted with this issue, they can be assured that it will continue to stretch far beyond the Florida Senate floor and will eventually find its way into their tribunals. But before these issues can be adequately addressed, Florida's Legislature must choose from among the many alternative schemes of regulation available. Simply prohibiting surrogate arrangements will only lead to greater confusion. If this occurs, the parties involved will be left without any protection or notion as to the nature of their remedies and rights. This scenario would be contrary to Florida's compelling interest in protecting and ensuring the welfare of its children.

Undoubtedly, Florida's Legislature will face the surrogate parenting issue again. Some lawmakers may propose legislation declaring it a form of baby-selling. Certainly, we cannot allow legislators' ideals of a perfect society to cloud their responsibility. In an ideal world there would be no couples who desperately want a child, but are unable to conceive. As one family law expert put it, "We must consider the felt needs of the people. Surrogate motherhood just might be an idea whose time has come."¹⁴²

142. Dr. Doris Jonas Freed as quoted in Griffin, *supra* note 7, at 47.

